

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 15 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0092
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SUSAN MICHELLE TURNER,)	the Supreme Court
)	
Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101744001

Honorable Edgar B. Acuña, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Appellant

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Appellee

H O W A R D, Chief Judge.

¶1 The state appeals from the trial court's order suppressing evidence obtained from a blood draw following the arrest of appellee Susan Turner. It argues the court erred in following *Kunzler v. Pima Cnty. Superior Court*, 154 Ariz. 568, 744 P.2d 669

(1987), claiming that the “*Kunzler* rule” is unfounded and should be overturned. Because the trial court did not err, we affirm.

Factual and Procedural Background

¶2 “In reviewing the grant of a motion to suppress, we view the evidence presented at the evidentiary hearing and any reasonable inferences from that evidence, in the light most favorable to upholding the trial court’s order.” *State v. Garcia-Navarro*, 224 Ariz. 38, ¶ 2, 226 P.3d 407, 408 (App. 2010). And we review only the evidence presented at the suppression hearing. *State v. Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d 833, 840 (2006).

¶3 After a Pima County Sheriff’s deputy observed Turner’s vehicle swerving, he conducted a traffic stop and found that Turner’s driver’s license was suspended. Despite the deputy’s requests, Turner refused to exit her vehicle, perform field sobriety tests, or submit to a portable breathalyzer test, stating that her attorney had advised her not to submit to those requests. Turner was arrested and transported to the sheriff’s district office. Turner refused to consent to a blood draw, again stating her attorney had told her “to say no.” The deputy ultimately obtained a warrant to draw her blood.

¶4 Prior to the blood draw, Turner asked to speak to an attorney but the deputy told her she would have to wait until after the blood draw was completed. The first blood draw was unsuccessful and a second phlebotomist was called to the station. A period of at least fifteen minutes elapsed between the two blood draws. During this delay, Turner asked to speak with an attorney but was not allowed to do so.

¶5 Turner moved to suppress the results of the blood test on the ground that her right to counsel had been violated. The trial court relied on *Kunzler* and found Turner’s right to counsel had been violated because allowing her to speak to an attorney while waiting for the second phlebotomist’s arrival would not have hindered the state’s investigation. The court granted Turner’s motion to suppress and the state’s motion to dismiss. The state filed this appeal.

Right to Counsel

¶6 The state argues the trial court erred in granting Turner’s motion to suppress, claiming the rule announced in *Kunzler v. Pima Cnty. Superior Court*, 154 Ariz. 568, 744 P.2d 669 (1987), is not required by the constitution or relevant statutes and is contrary to standard exclusionary principles. The state urges this court to reconsider and abolish *Kunzler*’s interpretation of a defendant’s right to counsel in the DUI context. “We review rulings on motions to suppress evidence for a clear abuse of discretion.” *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). However, we review de novo the court’s legal conclusions. *Id.*

¶7 “Rule 6.1(a)[, Ariz. R. Crim. P.,] recognizes the federal and state constitutional right to counsel” and provides that a defendant has the right to consult with an attorney ““as soon as feasible after a defendant is taken into custody.”” *Kunzler*, 154 Ariz. at 569, 744 P.2d at 670, *quoting* Ariz. R. Crim. P. 6.1(a). Our supreme court has interpreted this right to mean that a defendant may consult with an attorney prior to submitting to a test for physical evidence so long as exercising this right does not hinder an ongoing investigation. *Id.* at 569-70, 744 P.2d at 670-71. When a motion to suppress

based on *Kunzler* is filed, the state bears the burden to show that a phone call made by a defendant to an attorney would have interfered with an ongoing investigation. *See State v. Juarez*, 161 Ariz. 76, 80-81, 775 P.2d 1140, 1144-45 (1989). If a defendant's right to consult with an attorney is violated, suppression of the physical evidence is the proper remedy. *Id.*; *see also State v. Rosengren*, 199 Ariz. 112, ¶ 30, 14 P.3d 303, 312-13 (App. 2000) (obtaining warrant does not cure violation of right to counsel).

¶8 This court is “constrained by the decisions of our supreme court and [is] not permitted ‘to overrule, modify, or disregard them.’” *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 65 P.3d 1006, 1009 (App. 2003), *quoting City of Phoenix v. Leroy’s Liquors*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).¹ Further, the Arizona Supreme Court “has the power of final decision as to the meaning of the State Constitution.” *Menderson v. City of Phoenix*, 51 Ariz. 280, 288, 76 P.2d 321, 324 (1938).

¶9 In this case, the trial court correctly applied the rule set out in *Kunzler*. Turner was deprived of the opportunity to contact her attorney before the blood draw, even though it would not have interfered with the investigation. Because this court does not have the authority to invalidate or ignore our supreme court's ruling in *Kunzler*, we reject the state's request to reconsider that rule.

¹The state also cites to various cases from other states to show how those courts ruled regarding a defendant's right to counsel prior to submitting to chemical testing for blood alcohol content. Because this court is constrained to follow the Arizona Supreme Court's interpretation of the right to counsel under this state's constitution, we will not consider cases from other states. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 65 P.3d at 1009.

Conclusion

¶10 For the foregoing reasons, we affirm the trial court's suppression of the blood evidence obtained in violation of Turner's right to counsel.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge